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SUPREME COURT, U.S.
No. 572

In the Supreme Court of the United States

October Term, 1962

Alfred L. Gray, petitioner

v.

United States of America, respondent

and

[illegible] Gray, petitioner

v.

United States of America, respondent

On petitions for a writ of certiorari to the United States Court of Claims

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[illegible]

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 872

ALFRED L. OCHS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

and

ROBERTA OCHS, EXECUTRIX OF THE ESTATE OF DONALD F. OCHS, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Alfred and Donald Ochs, brothers, owned and operated a retail store, incorporated under the laws of Minnesota as Ochs Brothers, Incorporated. The corporate charter, having a term of 30 years, expired March 1944 (Pet. App. 30)—a fact overlooked by the brothers, who continued to operate the business and to report its income for tax purposes as though it were

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still a corporation. Section 300.39 of the Revised Minnesota Statutes of 1945 provides:

> Every corporation whose existence terminates by limitation, forfeiture, or otherwise shall continue for three years thereafter for the purpose of prosecuting and defending actions, closing its affairs, disposing of its property, and dividing its capital, but for no other purpose.

In December 1947, as a result of an audit of the corporation's income tax returns for the fiscal years ending January 31, 1943, through 1945, inclusive, the Ochs' tax counsel discovered that the charter had expired; at his suggestion, the brothers, on February 1, 1948, executed a partnership agreement purporting to be a memorandum of an oral agreement entered into on April 30, 1944. Under the agreement, the corporate stock was cancelled and the brothers, as partners, took over the assets of the corporation. (Pet. App. 31–33.)

In March 1947, a revenue agent's report, based upon an audit of the corporate returns filed by the Ochs enterprise for the fiscal years ending on January 31, 1943, 1944, and 1945, proposed deficiencies of $34,465.95. In April 1949, forms entitled "Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax" were executed for each of the three fiscal years by Alfred Ochs, "former President", in the name of the corporation and under the corporate seal. After a series of conferences concerning the proposed deficiencies, attended by officials of the Internal Revenue Service and by a representative of the Ochs corporation, a waiver of restrictions on

assessment was signed by Alfred Ochs on behalf of the corporation. In January 1950, he signed, again on the corporation's behalf, a similar document with respect to proposed deficiencies against the corporation for 1946 and 1947. (Pet. App. 34–37.)

In May 1950, demands were made upon the corporation for payment of taxes, and in August 1950, the Service caused to be served personally on one of the Ochs brothers a warrant for distraint directed to the corporation; and tax liens, also directed to the corporation, were filed. (Pet. App. 44–45.) The Ochs, fearing that their bank credit would be adversely affected by the warrants and tax liens issued against their former corporation, instructed their tax counsel to negotiate a basis for payment of the deficiencies. Payment was made in September 1950, after a settlement conference with the Revenue Service in which it was agreed that the amount of certain overassessments of the brothers individually would be applied to the corporate deficiencies. (Pet. App. 46–47.) After payment of the deficiencies, claims for refund were filed; and after rejection of the claims, suits were instituted in the Court of Claims.

In the Court of Claims the petitioners argued that Ochs Brothers, Incorporated, was not taxable as a corporation from the date of the expiration of its charter; that waivers of the statute of limitations on assessments, executed in the name of the corporation, were invalid and the assessments, therefore, untimely; and that petitioners were not properly liable as transferees. In a carefully reasoned opinion, the Court of

Claims resolved all these questions against the petitioners. (Pet. App. 24–26.) In their petition for certiorari, only the question of the liability of petitioners as transferees is raised.

The decision of the Court of Claims is eminently correct; there is no conflict of decisions; and the questions at issue have little, if any, significance outside the context of these cases. Petitioners do not here contest the propriety of the tax. Rather, their principal contention seems to be that because no assessment was made against them, or a statutory notice of deficiency directed to them, in their capacity as transferees, they were somehow deprived of an opportunity to challenge the merits of the assessments against the corporation. This charge is groundless. To be sure, petitioners were not in a position to bring suit in the Tax Court. The reason for that, however, was simply that they chose (a) to waive, on behalf of the corporation, the right to receive the statutory notice of deficiency upon which a petition to the Tax Court may be predicated; and (b) to negotiate a settlement of both the corporate and transferee liabilities, and to pay the taxes of the corporation, before the Commissioner had occasion to issue a statutory notice of deficiency against them as transferees. (Pet. App. 44, 46–47.) Having elected to pay the tax, petitioners were, of course, relegated to a suit for refund in the district court or the Court of Claims.

In the present suits for refund, petitioners had full opportunity to raise any argument they wished as to the merits of the assessments against the corporation

and as to their own liability as transferees. Indeed, in the court below, petitioners did raise the substantive issue whether the business was taxable as a corporation and, further, challenged the assessments as untimely on the ground that the waivers of the statute of limitations were ineffective.

Petitioners urge that their waivers of the statutory restrictions on the assessments and their payment of the corporation's tax were made under duress, and that if the decision of the Court of Claims rested upon the premise that they were "volunteers," it was in conflict with *District of Columbia* v. *American Security and Trust Co.*, 202 F. 2d 21 (C.A.D.C.), *Atchison &c. Ry. Co.* v. *O'Connor*, 223 U.S. 280, and *Union Pac. R.R. Co.* v. *Pub. Service Comm.*, 248 U.S. 67. (Pet. App. 13–16.) It should be emphasized that if petitioners felt under pressure to settle the corporate tax liability, that pressure was exerted, as the Court of Claims found, by the "exigencies of business", not by improper threats of government officials. In any event, however, the cases cited by petitioners are entirely inapposite, for each of them involved a situation in which the plaintiff, in order to bring suit to recover an alleged unlawful tax or other exaction, was required to show that he had paid the exaction under protest or under duress. Here no such requirement is present; petitioners were free to seek a refund of the corporate taxes, regardless of the voluntariness of their payment and, indeed, they exploited that opportunity by bringing the instant action. Under these circumstances, the question whether their payment

should be characterized as "voluntary" or "involuntary" is without relevance.

For the reasons given, the petition for certiorari should be denied.

Respectfully submitted.

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